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August 29, 2012

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission’s Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient’s Prior Express Consent, CG Docket No. 05-338 (filed Nov. 30, 2010)

Dear Ms. Dortch:

Anda, Inc. (“Anda”) hereby submits for the record the attached *amicus curiae* brief it filed on July 20, 2012 in *Nack v. Walburg*, a case currently pending before the Eighth Circuit.¹ As the Commission is aware, the *Nack* case concerns the applicability of Section 64.1200(a)(3)(iv) of the Commission’s rules, which provides that commercial faxes sent with the prior express consent of the recipient must contain the same opt-out notice that appears on unsolicited fax advertisements.² This rule is also the subject of Anda’s Petition for Declaratory Ruling and Application for Review in the above-mentioned proceeding, both of which ask the Commission to clarify the rule’s statutory basis.³

In courts across the country, including in the *Nack* case, plaintiffs’ lawyers have proceeded under the incorrect assumption that the opt-out notice rule for solicited faxes arose

¹ Amicus Curiae Br. of Anda, Inc. in Support of Appellee, *Nack v. Walburg*, No. 11-1460 (8th Cir. filed Jul. 20, 2012) (“Anda Amicus Br.”), attached hereto as Attachment A.

² 47 C.F.R. § 64.1200(a)(3)(iv).

³ See Petition for Declaratory Ruling, *Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission’s Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient’s Prior Express Consent*, CG Docket No. 05-338 (filed Nov. 30, 2010); Application for Review, *Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission’s Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient’s Prior Express Consent*, CG Docket No. 05-338 (filed May 14, 2012).

under Section 227(b) of the Communications Act, which grants the Commission rulemaking authority only with respect to “*unsolicited* advertisements,”⁴ and in turn have relied on Section 227’s private right of action to bring lawsuits under the rule seeking enterprise-crippling damages based entirely on consensual fax communications. Anda’s Petition and Application for Review ask the Commission to resolve this uncertainty and clarify that the rule arose under some other grant of statutory authority cited in the promulgating order, such as Sections 4(i) or 303(r).⁵ If, however, the Commission declines to grant this clarification, Anda should be entitled to challenge the merits of the underlying rule in court under Sections 703 and 704 of the Administrative Procedure Act (“APA”), as set forth in the attached *amicus* brief.⁶

The Commission has expressed concern that allowing a private party to challenge this rule’s validity outside the traditional Hobbs Act framework would entail opening every Commission rule to collateral attack,⁷ but this concern is unfounded. The unusual private right of action in Section 227—which authorizes lawsuits based not only on statutory violations but also on alleged violations of rules “prescribed under” Section 227(b)⁸—poses special due process problems that are not present in most other regulatory settings and are not contemplated or addressed by the Hobbs Act. To Anda’s knowledge, Section 227 is the *only* section in the Communications Act that authorizes private lawsuits based on rule violations;⁹ the various other private rights of action appearing in the Act allow private parties to sue only for statutory violations.¹⁰ Section 227 thus creates a unique and dangerous prospect that a rule that departs from the statute, but that the Commission maintains was somehow promulgated pursuant to the

⁴ See 47 U.S.C. 227(b)(2)(D) (emphasis added).

⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 ¶ 64 (2006) (citing 47 U.S.C. §§ 151(i) and 303(r)).

⁶ See Anda Amicus Br. at 8-11.

⁷ See Supp. Amicus Br. for the Federal Communications Commission Urging Reversal at 8-9, *Nack v. Walburg*, No. 11-1460 (8th Cir. filed Aug. 21, 2012) (“FCC Supp. Amicus Br.”).

⁸ 47 U.S.C. § 227(b)(3).

⁹ Another subsection of Section 227, 47 U.S.C. § 227(c)(5), creates a similar private right of action for Commission rules “prescribed under” the subsection’s subscriber privacy provisions.

¹⁰ See, e.g., 47 U.S.C. § 207 (private right of action for violations of “the provisions of this chapter”); *id.* §§ 274(e)(1), (2) (private right of action for “a violation of this section”); *id.* § 338(i)(7) (private right of action for a “violation of this section”); *id.* § 532(d) (private right of action for “failure or refusal of a cable operator to make channel capacity available for use pursuant to this section”); *id.* § 551(f) (private right of action for a “violation of this section”); *id.* § 553(c) (private right of action for “any violation of subsection (a)(1)”); *id.* § 605(e)(3) (private right of action for “any violation of subsection (a) or paragraph (4) of this subsection”).

statute, could give rise to a private right of action that Congress never intended to authorize.¹¹ Without the ability to challenge the validity of such a rule outside the Hobbs Act period, particularly when defending against a private lawsuit, a party could be exposed to crushing liability for violating an administrative regulation that may well be *ultra vires* or unconstitutional. Such an outcome cannot be squared with the guarantee of due process under the Fifth Amendment and is precisely what Congress sought to avoid in enacting Section 704 of the APA, which provides for judicial review of agency action when a party has “no other adequate remedy in a court.”¹²

The Commission cannot dismiss these due process concerns or contend that Anda has an “adequate remedy” by pointing to the availability of Hobbs Act review when the rule was promulgated in 2006, or by asserting that Anda could file a petition for rulemaking.¹³ Especially in the circumstances here, where the Commission failed even to mention the prospect of subjecting solicited faxes to regulation in the notice of proposed rulemaking,¹⁴ devoted all of one sentence to the rule in the promulgating order,¹⁵ and then contradicted itself by asserting elsewhere in that order that it was *not* adopting such a rule,¹⁶ it is patently unreasonable to expect

¹¹ While the Supreme Court acknowledged in its 2007 *Global Crossing* decision that, in some contexts, a private right of action that nominally authorizes lawsuits only for statutory violations may also be triggered by an alleged rule violation, the Court assumed no daylight between the statute and the rule, and certainly was not presented with a rule that, like Section 64.1200(a)(3)(iv), goes well beyond what the underlying statute authorizes. *See Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 58-60 (2007).

¹² 5 U.S.C. § 704; *see also Sackett v. EPA*, 132 S.Ct. 1367, 1374 (2012) (explaining that the APA “creates a presumption favoring judicial review of administrative action,” and rejecting attempts by the Environmental Protection Agency to overcome that presumption by pointing to provisions of the Clean Water Act providing for judicial review in other contexts).

¹³ *See* FCC Supp. Amicus Br. at 3, 12-13.

¹⁴ *See generally Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Notice of Proposed Rulemaking and Order, 20 FCC Rcd 19758 (2005).

¹⁵ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 ¶ 48 (2006) (announcing, without discussion, analysis, or citation to the statute, that even “entities that send facsimile advertisements to consumers from whom they obtained permission, must include on the advertisements their opt-out notice”).

¹⁶ *Id.* ¶ 42 n.154 (stating that “the opt-out notice requirement *only* applies to communications that constitute *unsolicited* advertisements”) (emphasis added).

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a party to find out about the rule and challenge it within the Hobbs Act's 30-day window.¹⁷ After all, Congress's approach to solicited fax communications has not changed since the Telephone Consumer Protection Act of 1991 ("TCPA"), which exempted from regulation any fax advertisements sent with the recipient's "prior express invitation or permission,"¹⁸ and Anda had no reason to suspect that the Commission would later issue an order departing from congressional intent and subjecting solicited faxes to regulation. As for the suggestion that Anda file a petition for rulemaking, a prospective rescission of the rule would not provide an "adequate remedy," as it would do nothing to halt the numerous private lawsuits across the country alleging violations of the rule as it currently stands.¹⁹

Please contact the undersigned if you have any questions regarding these issues.

Sincerely,

/s/ Matthew A. Brill

Matthew A. Brill
Counsel for Anda, Inc.

¹⁷ *Cf. Recreation Vehicle Industry Assoc. v. EPA*, 653 F.2d 562, 569 (D.C. Cir. 1982) (recognizing that the statutory period for filing a petition for review may not apply "when an agency leaves room for genuine and reasonable doubt as to the applicability of its orders or regulations").

¹⁸ *See* 47 U.S.C. § 227(a)(4) (codifying the TCPA's definition of "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission").

¹⁹ Nor would the Commission be able to make any rescission of the rule effective retroactively. *See NetworkIP, LLC v. FCC*, 548 F.3d 116, 123 (D.C. Cir. 2008) (holding that the Commission "may not retroactively change the rules at will").

ATTACHMENT A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MICHAEL R. NACK, individually and on behalf of all others similarly-situated,

Plaintiff/Appellant,

vs.

DOUGLAS PAUL WALBURG

Defendant/Appellee.

Appeal from the United States District Court for the Eastern District of Missouri,
Eastern Division Case No. 4:10-CV-00478-agf
The Honorable Audrey G. Fleissig, United States District Court Judge

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Anda hereby certifies that it is a wholly owned subsidiary of Andrx Corporation, which is a wholly owned subsidiary of Watson Pharmaceuticals, Inc.

/s/ Jeffrey W. Muskopf

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INTEREST OF AMICUS

Anda, Inc. (“Anda”) has a direct interest in ensuring that no private right of action is recognized under Section 227(b)(3) of the Telephone Consumer Protection Act (“TCPA”) for an alleged violation of the Federal Communication Commission (“FCC”) regulation at 47 C.F.R. § 64.1200(a)(3)(iv), which requires an opt-out notice on facsimile (“fax”) advertisements sent with the express consent of the recipient.

The district court properly granted Appellee’s motion for summary judgment, holding that there is no “private cause of action under the Telephone Consumer Protection Act for failing to include an opt-out notice on an advertising fax that was not ‘unsolicited,’ but rather sent after receiving the express approval of the recipient.” Order at 1. Anda has an interest in seeing the judgment affirmed. The legal issue whether the FCC regulation in question gives rise to a private right of action under the TCPA is significant not only to the parties in this action, but also to countless others, like Anda, who legitimately choose to exercise their right to commercial speech via fax.

Anda is currently defending itself against a class action complaint alleging violations of the TCPA. *See Medical West Ballas Pharmacy, Ltd. v. Anda, Inc.*, Circuit Court of St. Louis County, 08 SL-CC00257. Voluminous business records and sworn testimony indicate that Anda received permission from

customers prior to sending them fax advertisements. The outcome in this appeal may well affect the outcome of the lawsuit that has been filed against Anda, in which Plaintiff is seeking a total award of at least \$55,894,000 on behalf of a class of 890 putative class members for a failure to include a conforming opt-out notice on fax advertisements.

Pursuant to Federal Rule of Appellate Procedure 29, the source of Anda's authority to file this *amicus* brief derives from this Court's grant of its Motion to File *Amicus Curiae* Brief (being filed concurrently with this brief pursuant to Federal Rule of Appellate Procedure 29(b)). Counsel for Anda authored this brief in its entirety. Neither Defendant-Appellee nor its counsel contributed money that was intended to fund preparing or submitting this brief. Anda's liability insurer, Chartis, contributed money that funded preparing or submitting the *amicus* brief.

INTRODUCTION

In its *Amicus* Brief, the Federal Communications Commission ("FCC") characterizes Appellee Walburg's argument regarding the statutory basis of 47 C.F.R. 64.1200(a)(3)(iv) as "a thinly veiled challenge to the validity of" the regulation. *Amicus* Brief of FCC ("*Amicus* Brief"), p. 20. Relying on the Hobbs Act, the FCC then argues the Court lacks jurisdiction to hear any such challenge to Section 64.1200(a)(3)(iv) ("Regulation"). *Amicus* Brief, pp. 20-21. In a recent ruling, the FCC dismissed a petition by Anda, Inc. ("Anda") filed more than 20

months earlier, that, among other things, challenged the substantive validity of Section 64.1200(a)(3)(iv). *See* FCC Order, May 2, 2012 (“Order”) attached hereto as Exhibit A. Despite the fact that Anda—like Walburg—is a defendant in a private enforcement seeking to enforce Section 64.1200(a)(3)(iv)¹, the FCC, via an order signed by the FCC’s Acting Chief Consumer & Governmental Affairs, ruled Anda’s challenge to validity of the FCC’s Regulation was “time barred.” Order, pp. 3-4. According to the FCC, Anda’s challenge had to be raised “within 30 days of the date of publication notice of” the Commission’s Junk Fax Order, which occurred “in early 2006.” *Id.*, p. 3.

The FCC’s dismissal of Anda’s petition (“Petition”) and, if accepted by this Court, the arguments the FCC makes in this case, confirm that the judicial review provided by Hobbs Act is inadequate and does not provide meaningful judicial remedy or relief to parties like Walburg and Anda who are subject to private enforcement actions based on FCC regulations. The FCC’s position is now clear: under the Hobbs Act, Walburg has no available means of challenging the substantive validity of an FCC regulation being enforced via this private enforcement action.

In light of the absence of adequate judicial review and remedies under the Hobbs Act, Walburg has a right to challenge the substantive validity of the FCC’s

¹ *See Medical West Ballas Pharmacy, Ltd. v. Anda, Inc.*, St. Louis County, Missouri, Cause No: 08SL-CC00257.

Regulation under the Administrative Procedures Act's ("APA") exception to the Hobbs Act's limits on judicial review. *See* 5 U.S.C. §§ 703-704. Pursuant to Sections 703 and 704 of the APA, Congress adopted an exception to statutory limits on judicial review, like those included in the Hobbs Act, when the review or remedy provided is inadequate. *Id.* Section 704 of the APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." *Id.* § 704. Section 703, in turn, provides that "the form of proceeding of judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action." *Id.* § 703.

The FCC's Order and *Amicus* Brief collectively make clear that, under the Hobbs Act, parties like Walburg have no way to challenge the substantive validity of the FCC's Regulation in a court of law or before the FCC. The FCC rejected the challenge raised in Anda's Petition as untimely, and now argues Walburg cannot raise challenges to the regulation in this private enforcement action. Order, pp. 3-4; *Amicus* Brief, p. 20. As a result, to the extent this Court concludes, as argued by the FCC, that Walburg is challenging the substantive validity of the FCC's Regulation, such challenge falls squarely within the APA's exception to the Hobbs Act's limits on judicial review of FCC regulations. *See* 5 U.S.C. §§ 703-

704. As a result, this Court has jurisdiction, through an express grant from Congress, to hear and decide any such challenge. *Id.*

DISCUSSION

A. The FCC’s Position is Now Clear: Walburg Cannot Raise a Challenge to the FCC Regulation in an Administrative Proceeding or in this Private Enforcement Action

The FCC has asserted that there are three potential “avenues to raise a challenge to the lawfulness of an FCC rule consistent with the jurisdictional limitations set forth in the Hobbs Act.” *Amicus* Brief, p. 22. According to the FCC, an aggrieved person may:

- (1) contest the validity of the rule in a timely petition for administrative reconsideration, *see* 47 U.S.C. § 405, and, if such request is denied, seek judicial review under the Hobbs Act;
- (2) at any time, petition the FCC to amend or repeal the rule on the basis that the rule is unauthorized by statute, *see* 47 C.F.R. § 1.401, and obtain judicial review in the court of appeals under the Hobbs Act if the agency denies the petition; or
- (3) if the FCC issues an order applying the rule to a party², the party may seek judicial review of the order under the Hobbs Act and challenge the

² Under the FCC’s view, Walburg would have the right to challenge the validity FCC’s regulation if the FCC itself had brought an action to enforce the regulation. In such instances, and pursuant to *Functional Music*, Walburg could challenge the validity of the FCC regulation at issue “as applied” to Walburg. *Functional Music, Inc*, 274 F.2d at 546. As the court in *Functional Music* explained, “unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.” *Id.* Here, solely because a private party is seeking to enforce the regulation, as opposed to the FCC, the FCC argues that Walburg has no right to raise invalidity of the regulation as a defense, attempting to deny Walburg, who is ultimately affected by the rule, “an opportunity to question its validity.” *Id.*

validity of the rule in that appellate proceeding, provided that the party previously presented the same argument to the FCC in the administrative enforcement proceeding. *See Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir. 1958); 47 U.S.C. § 405(a).

Id. According to the FCC “none of those avenues is available to Walburg in this case.” *Id.*

The FCC’s recent ruling dismissing Anda’s Petition confirms that a defendant subject to a private enforcement action has no way to obtain meaningful judicial review or adequate judicial relief under the Hobbs Act regardless of whether a petition for relieve is filed with the FCC or not. Like Walburg, Anda is a defendant in a putative class action seeking millions of dollars based on purported violations of Section 64.1200(a)(3)—to wit, failing to include opt-out language on solicited fax advertisements³. Anda filed a petition with the FCC seeking clarification of the statutory basis for Section 64.1200(a)(3)(iv) and challenging the validity of the Regulation. Despite acknowledging that Anda is a defendant in a private enforcement action based on the Regulation, the FCC concluded any attempt by Anda to challenge the substantive validity of the Regulation was “time barred.” Order, pp. 3-4. According to the FCC, such a challenge must have been raised “within 30 days of the date of publication of public notice of” the Commission’s Junk Fax Order, which occurred “in early 2006.” *Id.*, p. 3. If allowed to stand, the FCC’s position closes the door on

³ *See supra* note 1.

administrative challenges to the validity of the FCC's regulation to defendants in private civil actions seeking to enforce the FCC Regulation.

The FCC claims Walburg could file a petition to amend or repeal a regulation on the basis that rule is unauthorized by statute “at any time” and notes “no party has filed a petition to rescind the rule.” *Amicus* Brief, p. 22. The FCC, however, ignores the fact that, even if successful, such a petition would provide no meaningful relief or remedy to Walburg in this private enforcement action. Amendments and repeals apply prospectively—not retroactively. *See, e.g., Northeast Hosp. Corp. v. Sebelius*, 657 F.3d 1, 14 (D.C. Cir. 2011) (“the rule against retroactive rulemaking applies just as much to amendments to rules as to original rules themselves”); *Sierra Club v. Jacobs*, 2005 U.S. Dist. Lexis 46913 (S.D. Tex. Sept. 2, 2005) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms”). As a result, even if Walburg successfully challenged the validity of the FCC's Regulation, resulting in amendment or repeal of the Regulation, neither the FCC nor the Courts of Appeal designed by the Hobbs Act would be able to provide meaningful relief to Walburg in this private enforcement action.

Relying on the Hobbs Act, the FCC argues this Court's doors must also

remain closed to any challenge to the substantive validity of the FCC's regulations—even if such a challenge is raised as a defense to Plaintiff's private enforcement action. *Amicus* Brief, p. 21. If the FCC's position is adopted, Walburg cannot obtain meaningful judicial review of the FCC Regulation at issue in either an administrative petition to the FCC or in this Court. Put simply, the FCC argues that under the Hobbs Act, Walburg (and other similarly situated defendants) have no means of obtaining (1) judicial review of the substantive validity of the FCC Regulation Plaintiff seeks to enforce in this lawsuit; or (2) in the event the Regulation is, in fact, invalid, adequate judicial relief.

B. To the Extent Walburg is, in Fact, Challenging the Substantive Validity of the FCC's Regulation, the Challenge Falls Squarely Within the APA's Exception to the Hobbs Act's Jurisdictional Limits

If this Court agrees with the FCC that: (1) Walburg is challenging the validity of the regulation⁴; and (2) such challenges are not permitted under the Hobbs Act, this Court has jurisdiction hear a challenge to the validity of the FCC's Regulation. Walburg's challenge to the validity of the FCC's Regulation falls within the Administrative Procedures Act's ("APA") exception to the Hobbs Act's jurisdictional limits. *See* 5 U.S.C. §§ 703-704. Pursuant to Sections 703 and 704 of the APA, Congress adopted an exception to statutory limits on judicial review,

⁴ The FCC characterizes Walburg's argument regarding the statutory basis of Section 64.1200(a)(3)(iv) as "a thinly veiled challenge to the validity" of the regulation. *Amicus* Brief, p. 20.

like those included in the Hobbs Act, when the review or remedy provided is inadequate. *Id.* Section 704 of the APA provides that “[a]gency action made reviewable by statute and *final agency action for which there is no other adequate remedy in a court* are subject to judicial review.” *Id.* § 704 (emphasis added). Section 703, in turn, provides that “the form of proceeding of judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute *or, in the absence or inadequacy thereof, any applicable form of legal action.*” *Id.* § 703. (emphasis added).

According to the FCC, the Hobbs Act provides the sole jurisdictional basis for challenges to FCC regulations, and “[t]his Court has no power to permit an ‘end run’ around the ‘statutory channels’ for review of FCC order.” *Amicus Brief*, p. 23 (quoting *United States v. Any and All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000)). The FCC is wrong. In *Any and All Radio Station Transmission Equip.*—the case relied on by the FCC—this Court recognized an exception to the Hobbs Act’s jurisdictional limits where, as here, such limits prevent a party from obtaining meaningful judicial review of the regulation at issue. 207 F.3d at 463 (8th Cir. 2000) (court noted its conclusion regarding lack of jurisdiction under Hobbs Act “might be different” if the defendant “had no way of obtaining judicial review of the regulations” at issue).

As noted above, Congress expressly adopted this very exception to the

Hobbs Act and other statutory limits on judicial review. *See* 5 U.S.C. §§ 703-704. In so doing, “Congress has seen fit to provide broadly for judicial review of those actions, affecting as they do the lives and liberties of the American people.” *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 318 (D.C. Cir. 1988). This is fully consistent “with fundamental notions in our policy that the exercise of governmental power, as a general matter, should not go unchecked.” *Id.* Congress provided specifically for review of “final agency action for which there is no other adequate remedy in a court.” *Abbott Labs. v. Garnder*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 704). And, the United States Supreme Court has noted that the APA’s “generous review provisions” must be given a ‘hospitable’ interpretation.” *Id.* (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)); *see also Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012) (“The APA’s presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all.”). In *Sackett*, the Supreme Court recently held, over the Environmental Protection Agency’s objections, that a compliance order issued by that agency was a “final agency action for which there is no adequate remedy” and, as a result, permitted review of the order under the APA. 132 S. Ct. at 1374.

The circumstances here are analogous to those in *Sackett*. Due to the convergence of unique circumstances in this case, namely: (1) a private enforcement action; (2) the FCC’s refusal to hear challenges to the validity of its

Regulation; and (3) the rule against retroactive agency rulemaking, judicial review as provided for by the Hobbs Act and any available relief for such review are inadequate. The FCC takes the position that under the Hobbs Act, Walburg cannot raise the substantive invalidity of the FCC Regulation in a petition to the FCC or as a defense in this case. *Amicus* Brief, pp. 20-21. If that stance is upheld, Walburg has a statutory right under the APA to judicial review of the FCC’s regulation via “any applicable form of legal action.” 5 U.S.C. § 703. Thus, to the extent this Court concludes, as argued by the FCC, that Walburg is challenging the validity of Section 64.1200(a)(3)(iv), this Court has jurisdiction, through an express grant from Congress, to hear and decide Walburg’s challenge. *See* 5 U.S.C. §§ 703-704.

C. If the Court Agrees with the FCC That Section 64.1200(a)(3)(iv) Was Promulgated Pursuant to Section 227(b), the Regulation is *Ultra Vires* and Should be Declared Unlawful and Set Aside

The APA instructs courts to “hold unlawful and set aside agency action, findings and conclusions found to be . . . (C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right.” 5 U.S.C. § 706. To the extent this Court agrees with the FCC that the Regulation was promulgated pursuant to 47 USC § 227(b), the Regulation is *ultra vires* and should be declared “unlawful and set aside” by this Court. *Id.* As explained, in detail, in the Response Brief of Appellee Douglas Paul Walburg to the FCC’s *Amicus* Brief Filed by Federal Communications Commission (“Response to *Amicus* Brief”), Congress’s grant of

authority to the FCC in Section 227(b) was limited solely to regulating unsolicited fax advertisements. Response to *Amicus* Brief, pp. 13-16. Nothing in the plain language of Section 227(b) or the relevant legislative history suggests Congress intended to regulate solicited fax advertisements. Indeed, Section 227(b)(2)(D), which contains the substantive grant of rulemaking authority directing the FCC to prescribe regulations implementing the Junk Fax Protection Act's opt-out notice requirements, is expressly *limited* to "unsolicited advertisement[s]." 47 U.S.C. § 227(b)(2)(D).

The FCC, like other federal agencies, "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). The Commission "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Hence, the FCC's power to promulgate legislative regulations is limited to the scope of the authority Congress has delegated to it. *Id.* (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988)).

Nothing in Section 227(b) directs or authorizes the FCC to regulate solicited faxes. The FCC concedes as much, purporting to find its authority to regulate solicited faxes in Section 227(b)'s "silence." *Amicus* Brief, pp. 17-18. Congress's silence is not enough.

Courts have repeatedly rejected attempts by government agencies to expand their powers beyond those delegated by Congress. *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994) (quoting *Lyng v. Payne*, 476 U.S. 926, 937 (1986)). In *Railway Labor Executives Ass'n*, the Court of Appeals for the District of Columbia Circuit rejected the National Mediation Board's ("Board") attempt to expand its authority to initiate investigations into representation disputes among railway employees *sue sponte*. Like the FCC in this case, the Board could not trace its authority to any express statutory language. After surveying the plain language of the statute and relevant legislative history, the court of appeals found that Congress never granted authority to the Board to initiate investigations *sua sponte* and rejected the Board's attempt to do so. In reaching its conclusion, the court of appeals explained,

Unable to link its assertion of authority to any statutory provision, the Board's position in this case amounts to the bare suggestion that it possesses plenary authority to act within a given area simply because Congress has endowed it with some authority to act in that area. We categorically reject that suggestion. Agencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature. The duty to act under certain carefully defined circumstances simply does not subsume the discretion to act under other, wholly different, circumstances, unless the statute bears such a reading. We cannot conclude, as the Board would have us do, that the fact that the Board is empowered to certify employee representatives in certain limited situations means the Board therefore enjoys such power in every instance in which a question of representation arguably exists.

Railway Labor Executives' Ass'n, 29 F.3d at 670-71 (internal citations)

omitted).

Pursuant to Section 277(b), Congress gave the FCC the power to regulate *unsolicited* fax advertisements. Nothing in the plain language of Section 227(b) or its legislative history suggests that, by so doing, Congress gave the FCC authority to regulate *solicited* fax advertisements. The mere fact that Congress delegated the authority to regulate unsolicited fax advertisements is not enough. *See Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (finding that the FCC does not possess plenary authority to act within a given area simply because Congress has endowed it with some authority to act in that area); *American Bar Association v. FTC*, 430 F.3d 457 (D.C. Cir. 2005) (finding the same with respect to the Federal Trade Commission).

The FCC argues that “[b]y mandating a ban on the transmission of unsolicited fax advertisements, *Congress did not preclude the FCC from adopting measures not expressly mandated by statute to protect consumers from receiving unwanted facsimile advertisements.*” *Amicus Brief*, p. 17 (emphasis added). Courts have repeatedly rejected this argument when made by the FCC and other federal agencies. *See, e.g., American Bar Association v. FTC*, 430 F.3d 457, 458 (D.C. Cir. 2005) (“if we were ‘to presume a delegation of power’ from the absence of ‘an express withholding

of such power, agencies would enjoy virtually limitless hegemony . . . ”) (quoting *Railway Labor Executive Ass’n*, 29 F.3d at 671); *Aid Ass’n for Lutherans v. United States Postal Serv.*, 321 F.3d 1166, 1174 (D.C. Cir. 2003) (“In this case, the Postal Service’s position seems to be that the disputed regulations are permissible because the statute does not expressly foreclose the construction advanced by the agency. We reject this position as entirely untenable under well-established case law.”); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (“We refuse ... to presume a delegation of power merely because Congress has not expressly withheld such power.”); see also *Am. Library Ass’n*, 406 F.3d at 705-06.

If, as the FCC claims, the Regulation was promulgated pursuant to Section 227(b), the Regulation would expand the reach of the TCPA—for the first time—to apply to expressly consensual communications between private parties, something Congress never contemplated when enacting the TCPA or the JFPA. The Regulation would also broadly expand the private right of action created by Congress to apply to solicited fax advertisements.

As the Court of Appeals explained in *Railway Labor Executives Ass’n*, “[t]he duty to act under certain carefully defined circumstances simply does not subsume the discretion to act under other, wholly different, circumstances, unless the statute bears such a reading.” 29 F.3d at 671.

Nothing in the plain language of Section 227(b) or its legislative history suggests Congress intended or authorized the FCC to regulate solicited fax advertisements. Accordingly, the FCC acted *ultra vires* in enacting the Regulation. *Id.*; see also *In re Sealed Case 00-5116*, 237 F.3d 657, 670 (D.C. Cir. 2001) (holding that because Federal Election Campaign Act did not authorize Federal Election Commission to “make public an ongoing investigation” that statute’s “clear meaning” denied that power);

CONCLUSION

For the foregoing reasons, Appellee Douglas Paul Walburg respectfully requests that this Court affirm the District Court's judgment.

Respectfully submitted,

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Dated: July 20, 2012

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In accordance with Federal Rules of Appellate Procedure 31(b) and Circuit Rule 31(b), I certify that on July 20, 2012, I caused the foregoing brief to be electronically filed with the Clerk for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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